Supreme Court, U.S.
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In The
Supreme Court Of The United States

JOSEPH CALDRELLO AND SANDRA CALDRELLO
Petitioners

v.

FEDERAL DEPOSIT INSURANCE CORPORATION
AND REPUBLIC CREDIT CORPORATION, I
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED FOR REVIEW

Whether the Connecticut Courts erred by failing to grant to the defendants, Joseph and Sandra Caldrello, due process under the law. Specifically, whether the Connecticut Courts erred in determining that the actions of the original plaintiff, First Constitution Bank, its successor, the Federal Deposit Insurance Corporation, and the additional plaintiff, Republic Credit Corporation, I, both before, at, and importantly after the second trial of this case, did not amount to an improper taking of the Caldrello property and the violations of their rights under the 4th, 5th, 7th and 14th amendments.

In addition the Connecticut Courts erred by not, as a result of the actions as recited herein, by not granting to the Caldrellos a new trial, in front of a jury, as to the merits of this case.

PARTIES TO APPEAL

1. Federal Deposit Insurance Corporation,

   Plaintiff-Respondent

2. Republic Credit Corporation, I,

   Plaintiff-Respondent

3. Joseph Caldrello,

   Defendant-Petitioner

4. Sandra Caldrello,

   Defendant-Petitioner

Note: There are a large number of additional parties who did not participate in the trials or appeals of this matter and for that reason are not identified.

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OPINION BELOW

The opinion of the Appellate Court of the State of Connecticut is reported at FDIC v. Caldrello, 68 Conn. App. 68 (2002), the denial of the writ of certiorari to the Supreme Court of the State of Connecticut is reported at FDIC v. Caldrello, 260 Conn. 903 (March 14, 2002), Appendix, infra.

JURISDICTION

The denial of the writ of certiorari to the State of Connecticut Supreme Court was released on March 14, 2002. The jurisdiction of this court is invoked pursuant to Rule 10(c) of the Supreme Court Rules.

COURSE OF PROCEEDINGS

This foreclosure case was originally filed in the Connecticut Superior Court, Judicial District of New London, at New London, on July 31, 1989 by the then plaintiff, First Constitution Bank.

The plaintiff obtained a judgement in its favor on September 8, 1992. Such judgment was appealed to the Appellate Court of the State of Connecticut by the defendants, Joseph and Sandra Caldrello.

Prior to the appeal being heard the plaintiff failed and was

taken over by the Federal Deposit Insurance Corporation who was substituted as the plaintiff. The FDIC then removed the matter to the Federal District Court for the District of Connecticut. The matter was subsequently remanded back to the State of Connecticut Appellate Court, where the appeal was heard and decided in favor of the appellants.

Sent back to the trial court the plaintiff failed to appear at a scheduled pre-trial, and were non-suited. Despite failing to move to re-open in the normal time period given under the Connecticut Rules of Practice the FDIC was allowed to open up the judgment of non-suit.

After the case was re-opened a second trial was held. On October 7, 1999, after that trial, the FDIC got judgment in its favor. That judgment was appealed by the defendants, Joseph and Sandra Caldrello and on January 25, 2002 the Appellate Court for the State of Connecticut denied the appeal. While the appeal was pending the plaintiff, Republic Credit Corporation I purchased the note and mortgage from the FDIC and became a party plaintiff.

A petition for certification to the Supreme Court for the

State of Connecticut was filed on February 13, 2002 and denied on March 14, 2002. This petition for certification follows.

STATEMENT OF THE CASE

A. Background of the case.

On its face this matter would seem to be a simple foreclosure. That is not the case. Ultimately this matter deals with issues of fundamental fairness and due process.

Simply put, certain actions of the First Constitution Bank before it failed, actions of the FDIC after the First Constitution Bank failed, and actions of Republic Credit Corporation, I after the FDIC purported to transfer these assets to it were all show a continuing course of conduct which require that a new trial be given to the defendants.

It is important to note that although some of these actions complained of occurred before the FDIC took over the asset, and before the second trial of this matter, many of them took place afterwards.

In testimony in front of the trial court, the defendants presented evidence that the First Constitution Bank had

misplaced funds belonging to the defendants, and that this misplacement of funds had created an inability on the part of the defendants to pay the mortgage.

The evidence presented was that Mr. Caldrello had deposited a $500,000.00 cashier's check into his personal account, that drawing on these good funds he deposited $300,000.00 into one of his business accounts, and that this later deposit was not properly credited by the bank. As a result of this mistake by the bank, which was never acknowledged by bank officials, checks drawn on the business account were not honored causing serious and permanent harm to Mr. Caldrello.

In addition it was claimed that the bank had improperly released, out of escrow and without Mr. Caldrello's permission, stock in one his company's to a third party. Such stock was valued at 3.5 million dollars, and was security for a loan for which Mr. Caldrello obtained the $500,000.00 check discussed above.

Bank records introduced into evidence showed the bank redepositing the funds on an official bank holiday, obviously an impossibility. However, as recited, the bank officials never told

Mr. Caldrello it had allegedly redeposited the funds.

This evidence was not seriously challenged by the plaintiff. Some of this evidence shows that a fraud was perpetuated.

In addition a number of factors show that a continuing course of conduct, still ongoing, has occurred. That continuing course of conduct amounts to a fraud upon the court. The conduct, includes that recited hereinbefore and the following, but is not limited by this submission.

At the first trial of this case a then official of the First Constitution Bank testified about the origin of certain purported bank records. These records purported to show that the loan was current and in fact there was an escrow balance in excess of $70,000.00. At the first trial he could not identify the document as a bank document.

When called to testify at the second trial his testimony was quite different, and identified it as a bank document but disagreed about its purported import. None-the-less, when asked about it he stated that had he gotten it he would have tried to withdraw the excess escrow funds. He also testified differently about payments made on the underlying loan and

about alleged writedowns on the loan.

A bank official testified that the loan to the defendants had been written down by the bank, but that no IRS form 1099 had ever been sent to the Caldrellos, despite the fact that such was required by the tax laws.

At the second trial a representative of the FDIC misrepresented to the court the true effect of certain bank documents.

At the second trial an officer of the FDIC testified that it was proper for the FDIC to give verbal consent to a tax sale when in fact the FDIC's established rules and procedures required written consent using a specific form.

The FDIC and Republic never produced certain documents requested by the defendants and which were in their possession. This included some of the original documents produced prior to the first trial by the defendants, of which there have been a number of unsuccessful attempts to obtain them.

The FDIC agreed not to transfer the property subject of this lawsuit while litigation was pending and did so anyway.

The FDIC sold the property before the underlying litigation was concluded.

The FDIC never produced at trial the original loan documents.

The FDIC sold this property without the benefit of a public sale or auction. In connection with this, there were at least two persons in the New London area who communicated with the FDIC about purchasing this asset. Rather than let them make competitive bids the FDIC sold the property to Republic Credit for an undisclosed amount.

In connection with the sale the FDIC apparently sold assets worth well over a million dollars for the sum of $10.00, giving these away for the sole purpose of depriving the defendants of them.

Upon information and belief, the FDIC also improperly transferred the property using an out of date power of attorney that, on its face, could not be used to transfer these assets.

The FDIC made a claim against the successor to the First Constitution Bank and/or an insurance fund directly related to claims made by the defendants, and collected on those claims

without notifying the defendants that they had done so.

Nor did the FDIC give the defendants any credit for the amounts that they received from the successor to First Constitution Bank and/or the insurance fund.

In a tax sale of the subject property, additional property belonging to the Caldrello children was included in the description purportedly conveying the subject property. The FDIC and Republic have both acknowledged that the additional property should not have been conveyed, but despite repeated demand have not provided the Caldrello children with quit-claims deeds to the property.

As to such tax deed the FDIC had a duty to make sure the deed was correct before it recorded it and failed in its duty. Once it became aware of the deficiency in the deed it had a duty to correct it, and it never has taken any steps to do so.

In connection with such sale the FDIC allowed it to occur despite the fact that the FDIC could have blocked the sale pursuant to 12 USC 1825(b), the tax warrants used for the sale were improper, were not served properly, and the FDIC did not give permission for the sale with the proper method and

form.

The attorney for the FDIC represented that the FDIC would not use a tax sale to try to short circuit this particular litigation, but in fact it attempted to do just that.

The net result of all of the actions of officials of First Constitution Bank, the FDIC and Republic may amount to criminal behavior. It certainly amounts to improper and unlawful behavior.

All of this had and has a continuing effect on Mr. Caldrello and in particular his wife and their three children.

REASONS FOR GRANTING THE WRIT

There are special and important reasons for granting the writ in this case. This Honorable Court should grant certiorari because the failure to do so would result in a grave miscarriage of justice. Although this case does not deal with the application of the federal rules as it did the case decided by this Honorable Court of United States v. Beggarly, 524 U.S. 38 (1998) the facts of this case clearly implicate the reasoning set out therein. In that case this court determined that relief is available to petitioners where there has been a "grave miscarriage of

justice.", Beggarly, 524 U.S. at 46.

The miscarriage of justice in this case is that the conduct of the First Constitution Bank, the FDIC and Republic Credit all combined to deprive the defendants of due process of the law.

Viewed in isolation each complained of action of First Constitution, of the FDIC, and of Republic is unsavory and improper. Each complained of action chopped away at the defendants' rights under the law. Each complained of action contributed to the damage caused to them.

When viewed all together the actions, which are still occurring, show a clear, unmistakable and distinct pattern of conduct designed to abrogate the defendants' rights and take their property without due process of the law.

The issues raised at the second trial of this case went to whether or not actions of First Constitution Bank had prevented the defendants from paying this loan. The uncontradicted evidence was that such actions had done so.

Issues were raised as to whether certain bank documents showed the loan was current at the time the initial foreclosure action was brought. The testimony of a bank official, as recited

before, was contradictory from one trial to the next.

The actions of the FDIC affected the amount of the judgment granted in this case.

The FDIC has procedure manuals identifying how and in what circumstances property can be transferred to other persons. Those procedures were ignored.

In this case you have a mistake by the bank, a cover up by the bank, a cover up of the cover up by the FDIC. You have officials of the bank and the FDIC making grave and significant misrepresentations to the court. You have a sale of assets by the FDIC done at time when they were not supposed to, a sale by the FDIC without a public auction and at what appears to be essentially a give away of the assets, and you have a sale done improperly according to the FDIC's own rules, and a sale done using an invalid power of attorney.

The power of the courts to address fraud is well established. Hazel-Atlas Glass Co. v. Hartford-Empire, 232 U.S. 238 (1944) stands for the proposition that equitable relief against fraudulent judgments is a judicially created remedy fashioned to relieve hardships which, from time to time, arise from a hard

and fast adherence to another court made rule. Created to avert the evils of archaic rigidity, this equitable procedure has always been characterized by flexibility which enables it to meet new situations and to accord all the relief necessary to correct the particular injustices which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations. See Hazel-Atlas Glass, supra..

When a claim of fraud upon the court is raised the court has the inherent ability to hear arguments on such. Procedural due process is intended to protect individuals from government acts. It is intended to secure the individual from the arbitrary exercise of the powers of the government. See Albright v. Oliver, 510 U.S. 266 (1994). The Caldrellos as individuals should therefore be protected from predatory acts of the FDIC, an arm of the government. To date they have not been afforded that protection.

The defendants certainly did not get the benefit of due process when the trial judge ignored testimony that they had been unable to pay the loan due to actions of the First

Constitution Bank. This equitable claim is quite similar to that raised in Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227 (1937) in which the court found that the plaintiff had prevented the defendant from paying an insurance company policy premium and therefore could not take advantage of the defendant's failure to pay the premium. The defendants presented evidence of scienter on the part of the plaintiff. The defendants produced evidence that the plaintiff ignored and disregarded facts thus misleading the court. See Sunstrand Corp. v. Sun Chemical Corp., 553 F.2d 1033 (7th Cir. 1977). This amounts to scienter.

Scienter in this case is also found in the transfer of the property by the FDIC to Republic. This transfer was clearly an attempt on the part of the FDIC to avoid the defenses asserted by the Caldrellos, was done improperly and unlawfully. The transfer was for essentially no consideration and in fact Republic got the right to a potential $366,000.00 in addition to the property, subject of the foreclosure. As security instruments the transfer of these instruments are subject to the provisions of the Securities Act of 1933, and the Securities

Exchange Act of 1934. By doing these improper acts the FDIC violated those acts and committed acts of scienter. See Aaron v. SEC, 446 U.S. 680 (1980). See also Rubin v. United States, 449 U.S. 424 (1981).

The plaintiffs and/or their predecessors in interest have engaged in a continuing course of conduct which has deprived them of their property without an opportunity to be heard by a jury. Such opportunity is an essential requirement under the law and the defendants have not received it. See Fuentes v. Shevin, 407 U.S. 67 (1972) and Mullane v. Central Hanover Trust, Co., 339 U.S. 306. See also Baltimore & Caroline Line v. Redman, 295 U.S. 654 (1935) in which this court reiterated parties right to a jury trial.

One claim that the plaintiffs will make is that none of the acts complained of above were deliberate. The defendants would certainly disagree with such claim. However, it is immaterial. Under 28 USC 1346(b), the government is responsible for negligent acts of its agents, servants and/or employees. See Indian Towing Co. v. U.S., 350 U.S. 61 (1955). The violation of a mandatory regulation, such as the

FDIC internal regulations and procedures alluded to, open up the United States to liability under the act. See U.S. v. Gaubert, 495 U.S. 315 (1951).

The defendants have also suffered a deprivation of their rights under the 4th amendment. As a result of the what has happened their property has been effectively seized. This is improper under the law. See Soldal v. Cook County, 506 U.S. 121 (1992), U.S. v. Jacoby, 466 U.S. 109 (1984) and Katz v. U.S., 389 U.S. 347 (1967).

In anticipation of one of the plaintiff's likely positions, that is, that some of what is complained of, i.e. the bank losing the check, etc. is res judicata, the defendants' response is that there was never a trial on the merits of the allegations. The matter was disposed of at the federal court on a motion for summary judgment on standing and statute of limitations grounds. Again, there was never a trial on the merits.

CONCLUSION

The FDIC, Republic and First Constitution Bank engaged in a long series of actions both before and after the second trial of this matter. Although disturbing in isolation the acts as a whole

are repugnant. These actions deprived the Caldrellos of their property without the due process of the law. The Connecticut courts have failed to recognize this and have thus committed reversible error.

It is important in this case to remember that Justice Marshall said that whenever a man brings a dispute about his property this court should hear it and decide it pursuant to the precepts of Article 3, Section 2, Clause 1 of the Constitution.

Therefore, for all of the reasons recited above, it is respectfully submitted that the defendants, Joseph and Sandra Caldrello, were deprived of their rights under the law, specifically under the 4th, 5th, 7th and 14th amendments, that as a result they are entitled to a jury trial on the merits of the case and on the events that have transpired since this matter was tried, and that thus this petition of certiorari should be granted.

RESPECTFULLY SUBMITTED

THE PETITIONERS
SANDRA CALDRELLO
JOSEPH CALDRELLO

By _____

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FEDERAL DEPOSIT INSURANCE CORPORATION AND REPUBLIC CREDIT CORPORATION, I

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Court Decision A14-A35

FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER OF FIRST CONSTITUTION BANK *v.* JOSEPH M. CALDRELLO ET AL.

The petition for certification by the defendants Joseph M. Caldrello and Sandra V. Caldrello for appeal from the Appellate Court, 68 Conn. App. 68 (AC 20144), is denied.

Richard D. Haviland, in support of the petition.

Donald E. Frechette, in opposition.

Decided March 14, 2002

ANDRE EVANS *v.* COMMISSIONER OF CORRECTION

The petitioner Andre Evans' petition for certification for appeal from the Appellate Court, 68 Conn. App. 903 (AC 22034), is denied.

FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER OF FIRST CONSTITUTION BANK *v.* JOSEPH M. CALDRELLO ET AL.
(AC 20144)

Foti, Flynn and O'Connell, Js.

Syllabus

The defendant property owners, J and S, appealed to this court from the judgment of the trial in favor of the plaintiff receiver of a failed bank ordering strict foreclosure of certain of their real property. *Held:*

1. Contrary to the claim made by J and S, the trial court properly granted the plaintiff's motion to open a judgment of nonsuit that had been rendered when the plaintiff failed to appear for a pretrial conference; the evidence presented supported that court's determination that the plaintiff had not received proper notice of the nonsuit and that it had filed the motion to open within four months of learning of the nonsuit.
2. The trial court did not abuse its discretion in denying J and S's motion in limine to prevent the plaintiff from presenting certain newly disclosed evidence and testimony, the plaintiff having explained that the challenged evidence was merely supportive of evidence previously disclosed and J and S having been offered a continuance to allow them to review the documents.
3. The trial court properly declined to grant equitable relief to J and S on their claim that they had sustained certain business losses as a result of the plaintiff's allegedly negligent handling of a certain check, that court having found that that claim was collateral to the mortgage foreclosure, that there was no evidence that the mortgage itself was unusual or unconscionable, that although the mortgage obligation was personal, the claimed losses were corporate and that the claim had been resolved in favor of the plaintiff in an action in federal court.

Argued November 29, 2001—officially released January 25, 2002*

Procedural History

Action to foreclose a mortgage on certain real property, brought to the Superior Court in the judicial district of New London, where the court, *Hendel, J.*, rendered a judgment of nonsuit; thereafter, the court granted the plaintiff's motion to open the judgment; subsequently, the matter was tried to the court, *Hon.*

* January 25, 2002, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Joseph J. Purtill, judge trial referee; judgment of strict foreclosure, from which the named defendant et al. appealed to this court. *Affirmed.*

Richard D. Haviland, for the appellants (named defendant et al.).

Donald E. Frechette, with whom was *Joshua L. Milrad*, for the appellee (plaintiff).

Opinion

FOTI, J. The defendants Joseph M. Caldrello and Sandra V. Caldrello[1] appeal from the trial court's judgment of strict foreclosure. On appeal, the defendants argue that the court improperly (1) opened the judgment of nonsuit more than twenty months after it had been rendered, (2) allowed the plaintiff, the Federal Deposit Insurance Corporation (FDIC), to introduce certain evidence and the testimony of a witness, which had not been disclosed to the defendants until the eve of trial, and (3) failed to adjust the verdict for the undisputed unclean hands of the FDIC. We affirm the judgment of the trial court.

The following facts are undisputed. On November 22, 1988, the defendants executed a mortgage and note to First Constitution Bank (bank) in the amount of $2.2 million. In September, 1989, the bank commenced an action to foreclose the mortgage. The defendants filed an answer and counterclaim, denying that the note was in default and claiming an improper setoff by the bank against certain certificates of deposit owned by the defendants. On September 8, 1992, the court rendered a judgment of strict foreclosure in favor of the bank and against the defendants on the complaint and counterclaim. On October 2, 1992, the bank was declared

[1] Several subsequent encumbrancers were named as defendants but are not involved in this appeal. We refer in this opinion to the Caldrellos as the defendants.

insolvent, and the FDIC was appointed as receiver. By decision released April 11, 1995, this court reversed the judgment of strict foreclosure and remanded the case for a new trial. *First Constitution Bank* v. *Caldrello*, 37 Conn. App. 529, 656 A.2d 1053 (1995).

On June 23, 1995, a judgment of nonsuit was rendered against the FDIC for failure to appear at a pretrial conference. On January 21, 1997, the FDIC filed a motion to open the judgment of nonsuit, claiming, inter alia, that it never received notice of the pretrial conference. Following a hearing, the court granted the motion over the defendants' objection. The court subsequently rendered a judgment of strict foreclosure. The defendants then filed the present appeal.[2]

I

The defendants first argue that the court lacked the authority to open the judgment of nonsuit more than twenty months after it had been rendered.[3] The defendants contend that the court found that the FDIC had received notice and, therefore, improperly granted the motion to open. We disagree.

General Statutes § 52-212 provides in relevant part that "[a]ny judgment rendered or decree passed upon a default or nonsuit in the Superior Court may be set

[2] On September 11, 2000, this court ordered that Republic Credit Corporation be permitted to intervene as an appellee in this appeal. This court further ordered that the FDIC remain a party in the case. On September 27, 2000, this court remanded this case to the trial court for a hearing to consider the effect of the FDIC's purchase of the subject properties at a tax sale, and whether the mortgage being foreclosed was extinguished by the tax sale. On July 18, 2001, the trial court filed its memorandum of decision in which it concluded that the mortgage being foreclosed was not extinguished and is still viable.

[3] The defendants specifically argue that the court had no jurisdiction to open the judgment of nonsuit. The defendants' claim, however, challenges the court's general statutory authority to grant relief, not the court's jurisdiction. See *Kim* v. *Magnotta*, 249 Conn. 94, 102–103, 733 A.2d 809 (1999); *Opoku* v. *Grant*, 63 Conn. App. 686, 689–90 n.2, 778 A.2d 981 (2001).

aside, within four months following the date on which it was rendered or passed . . . upon the complaint or written motion of any party or person prejudiced thereby, showing reasonable cause, or that a good cause of action or defense in whole or in part existed at the time of the rendition of the judgment or the passage of the decree, and that the plaintiff or defendant was prevented by mistake, accident or other reasonable cause from prosecuting the action or making the defense."

"[I]t is axiomatic that the right to move to open and vacate a judgment assumes that the party who is to exercise the right be given the opportunity to know that there is a judgment to open." (Internal quotation marks omitted.) *Habura* v. *Kochanowicz*, 40 Conn. App. 590, 593, 672 A.2d 512 (1996). "In *Habura* v. *Kochanowicz*, [supra, 592], this court stated: 'Where the defendants have not *received* notice of the default judgment . . . the time within which they may move to set aside the judgment is extended by the delay in notification.' " (Emphasis in original.) *Tyler E. Lyman, Inc.* v. *Lodrini*, 63 Conn. App. 739, 746–47, 780 A.2d 932, cert. denied, 258 Conn. 902, 782 A.2d 137 (2001). The FDIC argues, and we agree, that the court was presented with sufficient evidence demonstrating that it did not receive notice of the entry of the nonsuit in a timely manner and that it filed its motion to open within four months of receiving notice.

The nonsuit was rendered against the FDIC on June 23, 1995, based on the failure of the FDIC to attend a pretrial conference scheduled for June 15, 1995. On January 21, 1997, the FDIC filed a motion to open the judgment of nonsuit. On March 10, 1997, the FDIC filed a brief in support of its motion. Attached to this brief was the affidavit of Penny Seaman, an attorney who represented the bank from the commencement of the action until after the initial judgment of strict foreclo-

sure on September 8, 1992. Seaman stated in this affidavit that after the FDIC was named receiver of the bank on October 2, 1992, the FDIC obtained other counsel and that she requested permission to withdraw as counsel for the bank. Seaman further stated that she had received no communication from the Superior Court since the defendants filed their initial appeal with the Appellate Court, and that she did not learn that the case had been remanded by this court until February 24, 1997, when she received a telephone call from counsel for the FDIC. Seaman specifically stated that she never received notice of the pretrial conference scheduled for June 23, 1995,[4] or copies of any pleadings that might have been filed in the case since notification of the appeal. Seaman stated that it is her practice to notify new counsel of any pleadings or notices that she receives in connection with a case transferred to the FDIC, and that if she had received notice of a pretrial conference or motions filed by the defendants, she would have notified counsel for the FDIC.

The FDIC also attached the affidavit of attorney Gale Kosto to the brief in support of its motion to open. Kosto attested that she had represented the FDIC as receiver from January 4, 1993, until April 11, 1995, in the appeal to this court and continued to represent the FDIC in this matter. This affidavit stated in pertinent part that she "had no notice of the assignment of pretrial, no notice of the entry of a nonsuit, and no notice of a motion to transfer, written or oral, from the Court or anyone else, until January, 1997." In this affidavit, Kosto recounted her dealings with counsel for the defendants and how she had learned of the nonsuit in January, 1997, from an attorney representing the FDIC

[4] The nonsuit was rendered on June 23, 1995. The pretrial was scheduled for June 15, 1995.

in a federal district court action.[5] The FDIC further attached a letter from Kosto to counsel for the defendants dated September 15, 1995, suggesting that they schedule a conference call with the Superior Court caseflow coordinator in New London to move the case along.[6] The FDIC further attached a letter from counsel

[5] The affidavit provides in relevant part as follows:

"7. In April, 1995, shortly after the publication of the opinion reversing and remanding this mater for a new trial, I called [attorney] Haviland to discuss plans for the new trial. . . . We discussed when the new trial might begin. Haviland said he thought the Court would calendar it in due time. He told me he was very busy.

"8. On September 15, 1995, having heard nothing from the Court or from anyone else about the new trial, I called the Clerk's office in Superior Court in New London to inquire about the Caldrello case, telling the person who answered the phone that it had been remanded for a new trial. She told me that the case must have 'fallen through the cracks.'

"9. I immediately called Attorney Haviland, left a message, and then, later in the day, hearing nothing from him, sent him the letter . . . dated September 15, 1995, in which I suggested that we make a conference call to Leslie Steiner, the Case Flow Coordinator, to see if we could move the case along.

"10. In the same mail, I sent an Appearance to the Superior Court.

"11. I heard nothing from the Court and nothing from Attorney Haviland.

"12. I first heard about the entry of a nonsuit in this foreclosure action from an attorney who represents the FDIC in the District Court action sometime toward the end of the first week in January, 1997. Attorney Douglas Poulin called to tell me that in the course of a telephonic pretrial conference in the case, now on appeal to the Second Circuit, after a judgment in favor of the FDIC, Mr. Caldrello mentioned that the FDIC had been defaulted in the foreclosure action.

"13. I immediately called the Court, only to learn that the file could not be located. I then called Haviland to ask him [what] had happened. He told me that the 'default' had entered sometime between the time the case was remanded and September 15. Upon file review, he reported that he believed notice came to him only by word of mouth, not from the Court. . . .

"14. I asked Haviland if he had made any attempt to notify me when he heard of the pretrial. He replied that he had been under no obligation to do so. He said that someone at the FDIC must have gotten notice, and if the FDIC failed to notify its counsel, that was not his problem.

"15. I asked Haviland whether he believed that as a matter of professional courtesy and candor he should have at the very least responded to my September [15] 1995 letter to tell me that a nonsuit had entered sometime earlier. My note reflects his answer: 'Apparently not.'"

[6] We note that this letter, dated September 15, 1995, was sent to opposing counsel within four months of the entry of the nonsuit.

for the defendants dated January 13, 1997, stating that he had reviewed his file and could not find any documentation regarding the default.[7] Finally, the FDIC attached the affidavit of attorney Ivan Rivera, FDIC's in-house counsel assigned to supervise this case. Rivera stated in the affidavit that he searched the FDIC's files and found no documentary evidence or notice of any kind to show that the FDIC had been notified of a pretrial conference on June 23, 1995, or any other date.

Following oral argument, the court granted the FDIC's motion to open.[8] We conclude that the evidence submitted in support of the motion to open supports the conclusion that the FDIC did not receive notice of the nonsuit and that it timely filed its motion to open within four months of learning of the nonsuit.[9] The court, therefore, had the authority and properly granted the motion to open the judgment of nonsuit. Id., 747–48; *Habura* v. *Kochanowicz*, supra, 40 Conn. App. 592–93.

II

The defendants next argue that the court improperly allowed the FDIC to introduce certain evidence and the

[7] The letter states in relevant part: "I have reviewed my file on this matter and I do not find any documentation regarding the default. My best recollection of what happened is that shortly after the foreclosure was remanded back to the trial court a pretrial was scheduled. I did not initially receive notice of that but found out somehow. I attended the pretrial and counsel for the FDIC did not appear, despite having been notified. I recall that your office was not notified, but someone did receive notice on behalf of the FDIC. At that time, Judge Hendel (I think) ordered a default against the FDIC."

[8] The motion was granted on the condition that the defendants be given ninety days to complete discovery, with no extension unless granted by the court.

[9] In so holding, we acknowledge the defendants' argument that the trial court specifically found that the FDIC had received notice. As the FDIC correctly points out, however, the defendants cite to portions of the transcript regarding notice of the pretrial conference, not notice of the nonsuit. A review of the transcript of the motion to open reveals that the court made no factual findings regarding whether the FDIC received notice of the nonsuit, and the defendants failed to request an articulation on this issue. See *Riggio* v. *Orkin Exterminating Co.*, 58 Conn. App. 309, 313, 753 A.2d 423, cert. denied, 254 Conn. 917, 759 A.2d 507 (2000).

testimony of a witness, which had not been disclosed to the defendants until the eve of trial. The FDIC counters that the court did not abuse its discretion in admitting evidence and testimony relating to certain records of the bank. We agree with the FDIC.

The following additional facts are necessary to our resolution of this claim. The contested evidence involved certain reductions in the defendants' loan balance. The defendants claimed at trial that payments had been made on the loan, resulting in the reduction in the balance. The FDIC countered that the reductions in the loan balance did not reflect payments, but were actually internal "write-downs," a practice used by the bank when the mortgage balance was not equal to the value of the mortgaged property.

The defendants filed a motion in limine dated April 27, 1999, arguing that certain documents that they received from the FDIC on April 15, 1999, regarding the loan balance should not be admitted into evidence. The defendants claimed that the trial was scheduled for April 27, 1999, and that disclosure of the documents at this late date amounted to "trial by ambush." During oral argument on the motion, counsel for the defendants argued that counsel for the FDIC had been in possession of the documents for almost one year and had not turned them over to him.

Counsel for the FDIC responded that the defendants had suffered no prejudice because the documents in question, certain debit and credit tickets, were backup documentation to five bank documents that had been supplied to the defendants prior to the May, 1998 trial date.[10] Counsel for the FDIC further stated that the individual who prepared the documents was present at trial and that counsel for the defendants would have

[10] It is undisputed that the case originally had been scheduled for retrial in May, 1998, but did not go forward at that time.

a full opportunity for cross-examination.[11] The court inquired of counsel for the defendants whether a continuance would be helpful to examine the documents, and counsel responded that it would not.[12] The court denied the motion in limine and allowed the introduction of the evidence.

"As a threshold matter, we set forth the standard by which we review the trial court's determinations concerning the admissibility of evidence. A trial court's ruling on the admissibility of evidence is entitled to great deference. . . . [T]he trial court has broad discretion in ruling on the admissibility . . . of evidence. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and . . . evidentiary rulings will be overturned on appeal only where there was an abuse of discretion and a showing

[11] Counsel for the FDIC argued in relevant part: "The witness who is here to identify those documents is the person who prepared them, and Mr. Haviland will have an opportunity to cross-examine her to whatever extent he feels necessary to make sure that he understands these documents. There was no . . . intention whatsoever to conceal these from him. He already knew that we considered five entries charge-offs. He already knew that there was documentation from the bank, which he had seen, which referenced these charge-offs, and now we simply have more supporting documents."

[12] Counsel for the defendants argues that a continuance was discussed as a possibility, but was never actually offered to the defendants. The transcript reveals the following colloquy:

"The Court: Mr. Haviland, would it be of any benefit to you if this hearing were postponed so that you can have a further opportunity to examine these documents and prepare for cross-examination?

"[Attorney Richard Haviland]: Your Honor, quite frankly it probably wouldn't, but again this goes—this goes to the pattern here in the federal case of what's happening in discovery. We get it as a, you know—we get it basically as the FDIC decides we should get it.

"If this trial was scheduled for this time this spring, early, you know, beginning of February, if I had gotten it then, I wouldn't be objecting to it, but, you know—you know, there has to be an ending point to the production of documents as they see fit, and I don't think a continuance would do me any benefit in terms of this. But I think that at some point you have to say enough is enough."

by the defendant of a substantial prejudice or injustice." (Internal quotation marks omitted.) *Hayes* v. *Decker*, 66 Conn. App. 293, 298, 784 A.2d 417 (2001).

The defendants argue that they suffered substantial prejudice and that the court abused its discretion in admitting these documents and permitting the witness to testify. The defendants first contend that, in the absence of the witness and documents, the FDIC would have had a more difficult time proving its case as to the issue of write-downs and, second, that the late disclosure prevented the defendants from having an expert witness examine the documents and comment on them. On the basis of our review of the record, we conclude that these reasons are insufficient to show an abuse of discretion by the court or that the defendants suffered prejudice by the introduction of this evidence. The court heard argument that this evidence was merely supporting documentation of evidence previously disclosed to the defendants. Because the defendants already had notice of the FDIC's position that the five reductions in the loan balance were internal write-downs, the introduction of this evidence cannot be considered "trial by ambush." Furthermore, when questioned by the court, counsel for the defendants indicated that a continuance to review the documentation would not be helpful. Under these circumstances, we cannot say that the court abused its discretion in denying the defendants' motion in limine and allowing the FDIC to present the challenged evidence.

III

The defendants' final claim is that the court improperly failed to adjust the verdict for the undisputed unclean hands of the FDIC. We disagree and conclude that the court properly declined to grant equitable relief to the defendants.

According to the defendants, it is undisputed that the bank lost a $300,000 check for a period of time, and then denied losing it, as did its successor, the FDIC. The defendants argue that as a result, checks written on Joseph Caldrello's business accounts bounced. The defendants contend that the bank did not give the persons to whom such checks had been written an explanation for the apparent lack of funds in the account and that as a direct result of the actions of the bank, they were unable to fulfill their obligations to the bank in paying the mortgage.

The court found, and we agree, that these claims were not properly before the court. The defendants' original counterclaim, dated November 7, 1989, contained no such allegations, and, in November, 1991, the court denied the defendants' request to amend the counterclaim to add such claims. The defendants did not challenge this ruling in their initial appeal to this court. *First Constitution Bank* v. *Caldrello*, supra, 37 Conn. App. 529.

Although that issue was not properly before the court, the court acknowledged that it had discretion, on equitable considerations and principles, to withhold foreclosure or reduce the amount of the stated indebtedness. *Hamm* v. *Taylor*, 180 Conn. 491, 497, 429 A.2d 946 (1980). The court, citing *Hamm*, further stated that it had the authority to extend the proceedings to enable the FDIC to respond to these claims. The court, however, held that, for several reasons, such action was not warranted in this case.

As the court properly found, the claims raised by the defendants are collateral to the mortgage foreclosure itself. The allegations involve conduct on the part of the bank that arguably caused damage to the defendants and reduced their ability to pay the mortgage. As the court held, however, there was no evidence that the

mortgage itself was unusual or unconscionable. Furthermore, the court found that, although the defendants entered into this transaction as individuals mortgaging residential real property, the alleged losses claimed were business losses suffered by the defendants' corporation. Finally, the court noted that these claims had been raised in a federal district court action, which was resolved in favor of the FDIC. *Caldrello* v. *Federal Deposit Insurance Corp.*, United States District Court, Docket No. 3:93CV1560(AHN) (D. Conn. June 25, 1996). We conclude, on the basis of these facts, that the court properly declined to grant equitable relief to the defendants.

The judgment is affirmed.

In this opinion the other judges concurred.

JUDY SANDVIG ET AL. *v.* A. DUBREUIL AND SONS, INC., ET AL.
(AC 20723)

Schaller, Mihalakos and O'Connell, Js.

Syllabus

The plaintiffs, J and K, sought to recover for personal injuries sustained by J in a fall that allegedly was caused by the negligent installation by the defendant contractor, D Co., of a ramp for handicapped access in the school where J worked. D Co.'s work was performed in 1989, and J fell on September 26, 1991. On February 23, 1993, D Co. filed a petition for bankruptcy for which an automatic stay issued. The plaintiffs' writ of summons and complaint were dated and served during the time that the stay was in effect. The plaintiffs' 1997 requests to amend the complaint were denied by the trial court, and, on March 29, 2000, that court rendered summary judgment in favor of D Co. On the plaintiffs' appeal to this court, *held*:

1. The trial court properly determined that the plaintiffs' proposed amendment to their negligence claim, which alleged that D Co. actively damaged floor tiles in the area of the ramp, did not relate back to the original complaint, which alleged that the defendant failed to repair already damaged or exposed tiles, and the amendment therefore was time barred.

NO. 511581

FDIC AS RECEIVER FOR FIRST CONSTITUTION BANK	:SUPERIOR COURT
VS.	:NEW LONDON :JUDICIAL DISTRICT :AT NEW LONDON
JOSEPH M. CALDRELLO, ET AL	:OCTOBER 7, 1999

MEMORANDUM OF DECISION

This is a contested action to foreclose a mortgage claimed to be in default. The basic facts are not greatly in dispute and are found to be as follows:

In 1988, defendant Joseph M. Caldrello was a businessman with a number of automobile dealerships in Connecticut and elsewhere. On November 22, 1988, Mr. Caldrello and his wife defendant Sandra V. Caldrello executed a mortgage and note to First Constitution Bank (hereinafter the Bank) in the amount of $2,200,000.00. The mortgagee pledged contiguous real property described as 929 Pequot Avenue, 939 Pequot Avenue, Lots 3, 4, 5, 6, 7, and 8, all in the City of New London. Interest was adjustable with the initial

rate being 8.500 percent. The monthly payment, including escrow, was in the amount of $17,696.09 with the first payment due January 1, 1989.

Claiming the mortgage to be in default, First Constitution Bank commenced a foreclosure action by writ, summons and complaint dated July 31, 1989, served on defendants on August 9, 1989 and filed on August 23, 1989, with a return date of September 19, 1989. The defendants in the action were the Caldrellos (hereinafter referred to as the defendants) and others.[1]

In response to a motion by plaintiff, on November 19, 1989, defendants disclosed that they had a bona fide defense to the foreclosure action. The nature of the defense was that a right of set off executed by First Constitution Bank had sufficient funds in certificates of deposit held by the bank to pay any defaulted payment. On the same date, defendants filed

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See First Constitution Bank vs. Caldrello, et al, 37 Conn. App. 529, 530, n.1 (1995).

a counterclaim claiming an improper exercise of right of set off. Defendants sought to amend the counterclaim on November 6, 1991, but the amendment was denied (Hendel, J.).

The matter came to trial and on September 8, 1992, a judgment of strict foreclosure was rendered in favor of the plaintiff bank and against defendants on the complaint and on the counterclaim. (Hurley, J.) This judgment was reversed and a new trial ordered by the Appellate Court. First Constitution Bank v. Caldrello, et al, 37 Conn. App., supra 529.

On October 2, 1992, the Commissioner of Banking of the State of Connecticut declared First Constitution Bank unsafe and closed the bank. The Federal Deposit Insurance Corporation (hereinafter FDIC) acquired the assets and liabilities of the bank and was appointed receiver. At the commencement of the second trial, FDIC was substituted as plaintiff. "The FDIC has the power as receiver to foreclose on

the property of the debtor." Lloyd v. FDIC, 22 f.3d 335 (1st Cir. 1994), citing 12 U.S.C. § 1821(d)(2)(B)(ii).

Although it does not appear to have any effect on the issues now before this court, it is noted from the file that in July, 1998 FDIC purchased the mortgaged property at a tax sale held by the City of New London. Subsequently, the parties stipulated the FDIC would not dispose of the property prior to trial.

I.

The first issue, which the court must decide is whether plaintiff has proven that the mortgage was in default at the time was brought in 1989 and whether it was in default at the time of trial.

The principal evidence in support of FDIC's claim that the mortgage was in default consisted of three documents and the testimony explaining the documents.

The first document was the Bank's "Mortgage Loan Customer Record Report." This was a three-page

computerized report designed to show the history of defendants' mortgage loan. The second document was a similar report entitled "Mortgage Loan Transaction History." The third document contained the "Mortgage Transaction Codes." The information on these documents was explained by Maureen Villani, a former officer of the Bank who had daily contact with the records and was involved with the defendants' mortgage.

The evidence shows that defendants made payments in the amount of $17, 696.09 on January 5, 1989 and February 17, 1989. A check in this amount was presented on April 5, 1989, and a triple payment of the same amount on May 31, 1989. These payments, however, were reversed and no funds were actually received by the Bank. The evidence is clear that the last payment made by the defendants on this mortgage was made on February 17, 1989. Defendants do not dispute this.

With no valid payments having been made since February 17, 1989, the mortgage was in default with a

principal balance of $2,193,244.42 due on August 11, 1989. On that date, the bank exercised its right of set off and used pledged certificates of deposit to credit defendants' loan account with four payments of $17, 696.09. These were the last payments made on the mortgage. According to the terms of the mortgage note, defendants were obligated to make monthly payments commencing January 1, 1989. The evidence is clear that they had not honored their obligation. They made two payments and were credited with four payments resulting from the set off.

It must be concluded that the mortgage note was not being paid according to its terms, was current only through June 1, 1989, and was in default when this action was commenced on August 23, 1989.

Defendants dispute that the FDIC has proven that the mortgage was in default at the time this action was instituted. They also dispute that it has been proven that it was in default at the time of trial. It is defendants' principal argument in this

regard that the "Mortgage Loan Customer Record Report," the Mortgage Loan Transaction History" and the "Mortgage Transaction Codes" admitted into evidence are highly suspect and, if anything, show an active mortgage not in default.

The first two documents were computer generated and there as testimony that the Bank's computer system was not as sophisticated as it could have been. The testimony of Ms. Villani and Timothy Doheny, a loan officer at the Bank who handled defendants' account, was necessary for an understanding of the documents and how from time to time they reflect the status of the mortgage loan. It is also noted that these exhibits were considered by the Bank to be "in house" working documents to be used by Bank personnel to reflect the economic health of the institution.

It is defendants' position that the documents reflect a number of substantial credits in their favor which appear to show the loan s active with the balance being reduced.

Testimony concerning these entries indicates that the

Bank was highly regulated by FDIC and the Connecticut Banking Department. These agencies required that the Bank submit reports showing its true net worth. To comply with these requirements a committee of the Bank would meet from time to tome to consider the value of mortgages as assets of the Bank. In situations where the mortgage balance was not equal to the value of the mortgaged property the committee would order a "write down." Ms. Villani would cause the amount of the "write down" to be entered on the documents in evidence. This would result in a reduction in principal on the documents. The purpose of this entry was only to reflect the value of the assets held by the Bank and was not intended as credits to reduce the amount of defendants' loan.

The way in which the Bank's computer system reflected these reductions in mortgage value is the source of the apparent confusion which defendants rely on.

An illustration of the problem is an entry on the Mortgage Loan Transaction History dated March 19, 1990.

This entry indicates a mortgage transaction Code 32. "Principal credit" of $400,000 applied against principal only. Defendants even received a computer generated statement of mortgage account dated December 31, 1990, indicating "Principal Paid During Year" $400,000.00 and an escrow payment of $23.71 with an escrow balance of $2,637.23.

The $400,000.00 was never paid by defendants or anyone else on their behalf. The better evidence leads to the conclusion that on March 15, 1990, the Bank committee which reviewed the bank assets met to consider the value of a number of mortgages, including defendants' mortgage. It was voted to reduce the value of a number of these mortgages and the value of the defendants' mortgage was reduced by $400,000.00 as a result of the vote. Ms. Villani, a member of the committee, prepared a Miscellaneous Monetary Mortgage Loan form reflecting the reduction of $400,000.00 with a Code 32. This information was entered on the Mortgage Loan Transaction History on March 19, 1990. A cursory examination of this

document might lead one to believe that on that date someone paid $400,000.00 to reduce the mortgage principal, but the evidence indicates that it did not happen.

Defendants dispute the validity of the three documents principally relied upon by FDIC to prove that the mortgage was, and is, in default. They claim that this evidence is not worthy of belief and that FDIC has not sustained its burden of proof on this essential allegation.

One contention of defendants is that the interpretation of the language used in the documents by the witness to show default is contrary to the plain English understanding of the words. For example, defendants argue that the words "paid" and "balance" should indicate the amount paid on the mortgage and the balance remaining. Another illustration of the language problem is apparent in connection with the March 19, 1990 transaction involving the $400,000 write downs. Ms. Villani assigned a Code 32 designation to this transaction. According to the code in evidence, 32 indicates "principal credit." This

would seem to indicate a payment on principal in that amount. As previously noted, however, no such payment was made on the principal owed.

There is no doubt that the language used by the Bank could have been more exact, but the documents were primarily intended for internal use and the testimony of the witnesses is logical and explanatory.

It is also argued that certain communications from the Bank to the defendants were inconsistent with the mortgage being in default. One of these items is a form letter dated May 31, 1989, thanking Mr. Caldrello for "banking with us." In January, 1991, the defendants were sent a form reminder to keep their property insured, and on at least two occasions after the start of the foreclosure, payments books were sent to defendants. FDIC also informed defendants of a change of address in 1998.

Standing alone, these documents might appear to be inconsistent with a mortgage in default. Placed in the context

of the great weight of the evidence to the contrary, however, this interpretation cannot stand. At best, the communications might show poor management on the part of the Bank and the FDIC with one hand not knowing what the other was doing. More likely, they fall into the category of junk mail with little evidentiary value.

Defendants also argue that FDIC's nonproduction of certain documents, such as minutes of the Bank directors' meeting and samples of customer record reports and transaction histories, raises an inference that the documents relied upon by FDIC to prove its case are not accurate. Defendants also claim that the documents have been altered to support the foreclosure action.

A review of the 291 indexed court papers which make up the file in this case fails to reveal any motion to compel production of the documents requested. The file does contain a "Request for Hearing Re: Discovery" filed on January 29, 1998, but there is no indication of further action on the request

or of any judicial action determining its merits.

Considering all of the evidence relative to the three exhibits, it cannot be found that they have been altered. Discrepancies do exist with respect to the exhibits and FDIC's claim, but considering all of the evidence, it is found that the exhibits are worthy of belief and that FDIC has sustained its burden of proof that the mortgage was in default at the time the action was started and that it has remained in default.

II.

On November 24, 1997, defendants filed a three-count counterclaim. The thrust of the counterclaim is that the right of set off exercised by the Bank on August 8, 1989, was improper under the law and that as a result defendant had suffered damages.

At trial, no evidence was introduced in support of the counterclaim and defendants have not addressed it in their brief.

This issue was raised in a case brought by defendants in

the Federal District Court (Joseph M. Caldrello, et al v. FDIC, et al, No. 3:93CV-1560(AHN) (D. Conn. June 25, 1996). The Federal District Court resolved the issue against the claim of improper set off. The United State Court of Appeals for the Second Circuit approved the District Court's decision by summary order filed August 21, 1997.

It must then be found that defendants have failed to prove the allegations of the counterclaim.

III.

On November 6, 1991, almost two years after the start of the foreclosure action, defendants moved to amend the counterclaim by adding three additional counts. These counts allege malfeasance on the part of the Bank in improperly crediting deposits made by defendant Joseph M. Caldrello in December, 1988. The motion to amend the counterclaim was denied on November 6, 1991 (Hendel, J.) and is therefore not properly before the court.

The allegations, which defendants sought to introduce

in this action by the amendment, were directly raised in the federal action above noted. The allegations were important because as Magistrate Judge Egan stated in his Recommended Ruling for Summary Judgment against these defendants, "It is alleged that the failure to credit deposits made to the right accounts caused checks written by the business (car dealerships) to be dishonored by creditors. These acts are alleged to be the cause of the financial downfall of Mr. Caldrello's business."

Although not included in the allegations, the original counterclaim, or the counterclaim which they attempted to file, defendants also maintain a claim based upon an escrow agreement mishandled by the Bank. This claim also has not been pleaded and is not properly before this court.

Although these issues were not properly before the court, not being part of the pleadings, the trial court in a foreclosure proceeding has discretion, on equitable considerations and principles, to withhold foreclosure or to

reduce the amount of the stated indebtedness. Connecticut Bank & Trust Co. v. Katske, 40 Conn. Supp. 560, 563 (1986). This would require the court to analyze the case to determine whether the Bank or the FDIC's conduct was no unconscionable that the court should withhold foreclosure under equitable principles.

Equitable power, however, must be exercised equitably. This would require that the equitable issues be properly raised in the pleadings and FDIC, being given an opportunity to make a factual response to the claims. Hamm v. Taylor, 180 Conn. 491 (1980). Since these issues have not been pleaded, it would be improper for the court to now withhold foreclosure.

Since we are dealing with equitable claims, however, the court would have authority to extend the proceedings, give parties an opportunity to respond and decide the issues. It does not appear that under the circumstances of this case that would be appropriate.

Under the circumstances of this case, such action is not

warranted for a number of reasons.

The equitable claims which defendants attempt to raise are, in fact, collateral to the mortgage foreclosure. In Hamm v. Taylor, supra, 180 Conn. 495, a case involving equity with respect to the mortgage interest rate, the Supreme Court stated that General Statutes § 42a-2-302 "although addressed primarily to contract for the sale of goods, furnishes a useful guide." This statute deals with situations where the court finds as a matter of law that a contract or any cause of the contract is unconscionable.

The claim here is that the Bank engaged in certain conduct and caused damage to the defendants, by inference, reduced their ability to pay the mortgage. There is, however, no evidence that the mortgage transaction itself was unusual or unconscionable.

Also, the defendants entered into the mortgage as individuals mortgaging residential property. The losses suffered as a result of the claimed misconduct on the part of

the Bank were business losses suffered by a corporation or corporations.

To enforce their claims against the Bank, a separate action would be more appropriate. This is what defendants attempted to do in the Federal Court action. As noted, in that action the issues were directly raised and all resolved against defendants.

With respect to defendants' claims that the Bank mishandled an escrow agreement, that document, or any copy of the document, does not appear to exist. It was not produced in this trial or in the federal action and there was no evidence of the Bank participation in the agreement. Enforcement of this claim against FDIC would be prohibited by the provisions of U.S. Code 12 § 1823(e)[2].

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U.S.C. 12 § 1823(e). No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement -

In their brief, defendants have made a number of claims that the conduct of the Bank and FDIC was such that the equitable powers of the court should be invoked to deny foreclosure of the mortgage. It was argued that the Bank was guilty of improprieties and altered documents. It was also argued that FDIC was guilty of similar conduct and purposefully withheld documents. Defendants argue, in effect, that in this equitable action, FDIC has not come into court with "clean hands." Pappas v. Pappas, 164 Conn. 242, 246 (1973).

In cannot be found, however, that any documents have

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1. is in writing,
2. was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor contemporaneously with the acquisition of the asset by the depository institution,
3. was approved by the board of directors of the depositor, institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
4. has been, continuously, from the time of its execution, an official record of the depository institution.

been altered or purposefully withheld or that such inequities were perpetrated against defendants so as to cause denial of the relief sought.

IV.

The mortgage, having been found in default, the Court is required to determine the balance due. John J. Murphy, a portfolio manager for FDIC having responsibility for defendants' mortgage, testified as to how he arrived at the balance claimed to be due. His testimony, together with other evidence, tends to confirm the amount of the debt. The debt is therefore found to be as follows:

Principal:	$2,193,336.31
Interest to	1,707,882.15
Total	$3,901,218.46

The per diem charge from April 26, 1999 is found to be $418.87.

In addition to principal and interest, FDIC has advanced $590,000.00 in payment of taxes to the City of New

London.

No finding is made as to attorney's fees, but the record indicates that the original judgment of September 8, 1992 found attorney's fees to be $68,804.92. Attorneys for plaintiff now claim fees in the amount of $31,427.52 exclusive of the appeal and the first trial.

From the evidence, the value of the real property secured by the Mortgage is found to be as follows:

929 Pequot Avenue	Land:	$100,000
New London, CT	Buildings:	$362,000
	Total:	$462,000
939 Pequot Avenue	Land:	$125,000
New London, CT	Buildings:	$110,000
	Total:	$235,000
Lots 3-8, Osprey Estate		$425,000
New London, CT		

Total value of real property, land and buildings is found to be $1,122,000.00.

Appraisal fees in the amount of $2,700.00 are approved.

Accordingly, judgment of strict foreclosure is entered

and law day is set for January 3, 2000.

Joseph J. Purtill
Judge Trial Referee